Petition

81-357

[redacted]

NO. _____

Office-Supreme Court, U.S.
FILED
AUG 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOE LACEY
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the
United States COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

K. Richard Payne
Suite 619
803 South Calhoun St.
Fort Wayne, Indiana
46802
(219) 422-1675

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOE LACEY

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the
United States COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

K. Richard Payne
Suite 619
803 South Calhoun St.
Fort Wayne, Indiana
46802
(219) 422-1675

QUESTIONS PRESENTED

1. Whether the government's failure to disclose that a tape recording of a telephone conversation between government witness Earnest Holliday and Petitioner Joe Lacey between July 11 and July 24, 1980, denied Petitioner due process of law as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the Court erred when it abandoned its detached and neutral judicial role by engaging in prosecutorial interrogation of a witness; thereby denying Petitioner a fair and impartial jury trial.

TABLE OF CONTENTS

	Page
Questions Presented	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, and Rule of Court Involved	3,4
Statement of the Case	5,6
A. How the First Federal Question was Raised	7-12
B. How the Second Federal Question was Raised	13,14
Reasons for Granting the Writ	15-36
Conclusion	37
Appendix A - Opinion Below	App.1-3
Appendix B - Motion to Reconsider Denial of Defendant's Verified Motion for New Trial	App.4-12
Appendix C - Order (Denying Motion For New Trial)	App.14-19
Appendix D - Verified Motion for New Trial	App.20-25
Appendix E - Order (Discovery)	App.26-27
Appendix F - Motion for Discovery (Defendant)	App.28-30
Appendix G - Docket Entries	App.32-35
Appendix H - Grand Jury Charges	App.36-37

TABLE OF AUTHORITIES

CASES

Adler v. United States, 182 Fd 464 (5th Cir, 1911)

Brady v. Maryland, 373 U.S.83, 10L.Ed 2d 215, 83 S.Ct. 1194 (1963)

Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 (CA4 Md, 1964)

Giglio v. United States, 405 U.S. 150, 31 L. Ed 2d 104, 92S Ct. 763 (1972)

Giles v. maryland, 386 U.S. 66, 17 L.Ed 2d 737, 87 S.Ct. 793 (1967)

Imbler v. Craven, 298 F.Supp. 795.affd. (CA 9 Cal.), 424 Fsd 631, Cert. denied 400 U.S. 865, 27 L.Ed. 2d 104, 91 S.Ct. 100.

Levin v. Katzenback, 363 F2d 287 (USCA D.C. Cir., 1965)

Nash v. Purdy, 283 F. Supp. 837 (USDC S.D. Fla., 1968)

Quercia v. United States, 289 U.S. 466, 77 L.Ed. 1321, 53 SCt. 698 (1932)

United States v. Butler, 567 F2d 885 (9th Cir., 1978)

United States v. Carmel, 267 F2d 345 (7th Cir., 1959)

United states v. DeSisto, 289 F2d 833 (2nd Cir., 1961)

United States v. Hill, 332 F2d 105 (7th Cir., 1964)

United States v. Lomas, 440 F2d 335 (7th Cir. 1971)

United States v. Marzano, 139 F2d 923 (2nd Cir. 1945)

Wesson v. United States, 172 F2d 931 (USCA 8 Cir., 1949)

CONSTITUTION

Fifth Amendment to the Constitution of the United States.

Fourteen Amendment to the Constitution of the United States.

FEDERAL RULES

Federal Rules of Evidence - Rule 614(b)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. _____

JOE LACEY
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioner, Joe Lacey, respectfully prays that a writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on June 22, 1981.

OPINIONS BELOW

The unreported opinion of the Court of Appeals, appears at Appendix A, infra, pp. 1, 2.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered On June 22, 1981. See Appendix A, pp. 1, 2, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 (3).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"Nor be deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The statute describing the situations in which a Defendant may appeal in criminal cases, 28 U.S.C. §1257(3), reads as follows:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States."

Rule 614(b) of the Federal Rules of Evidence providing the presiding judge with the power to interrogate witnesses provides as follows:

"The court may interrogate witnesses, whether called by itself or by a party."

STATEMENT OF THE CASE

This case originated on August 1, 1980, when Petitioner and two (2) co-defendants (not involved in this Petition) were charged by a Grand Jury indictment. Petitioner was indicted on two (2) separate counts of violating Title 21 of the United States Code, Section 841 (a)(1) and Section 846.

The Grant Jury charged in Count I as follows:

> On or about July 24, 1980, in the Northern District of Indiana, Joe Lacey, a/k/a Joe B. Lacey, and Gordon Arnold, a/k/a Arnold Gordon, knowingly and intentionally did distribute or possess with intent to distribute a quantity of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Section 841(a)(1), Title 21 of the United States Code and Section 2, Title 18 of the United States Code.

And, charged in Count III as follows:

> On or about July 24, 1980, up to and including July 25, 1980, in the Northern District of Indiana, JOE LACEY, a/k/a JOE B. LACEY, and GORDON ARNOLD, a/k/a ARNOLD GORDON, the defendants herein, wilfully and knowingly did conspire, combine, confederate and agree together, with each other and with diverse other persons whose names to the Grand Jury are unknown, to violate

Title 21 of the United States Code, Section 841(a)(1), to wit: to distribute cocaine, a Schedule II Controlled Substance, in violation of Section 846, Title 21 of the United States Code.

On August 15, 1980, Petitioner was arraigned and entered a plea of not guilty to the charges.

On October 20 and 21, 1980, a jury trial was held with the Honorable Jessee E. Eschbach, Presiding Judge. (Tr. pp. 1-409).

The jury returned a verdict finding Petitioner guilty as charged in each count of the indictment on October 21, 1980. (Tr. p. 406).

On November 28, 1980, Petitioner was sentenced to imprisonment for a period of six (6) years plus a three (3) year special parole term, and a fine of $5,000.00 plus court costs on Count I. On Count III, Defendant was sentenced to imprisonment for six (6) years, to run concurrently with his sentence in Count I.

The Court of Appeals for the Seventh Cir-

cuit affirmed the judgement of the district court in an order dated June 22, 1980. (App. A. infra pp. 1, 2).

WHEN THE FIRST FEDERAL QUESTION WAS RAISED

The evidence at trial demonstrated that on or about July 11, 1980, an investigation was initiated by Lt. Walter Spillers of the Mississippi Bureau of Narcotics with the aid of an informant, Earnest Holliday. (Tr. p. 213).

Earnest Holliday had one prior conviction in Mississippi and was, during July, 1980, under another charge for selling marijuana. Holliday's case in Mississippi was still pending at the time of trial. (Tr. p. 90). Holliday testified that Lt. Spillers had told him, "It would be a whole lot better on me, he said on me, if I did, you know, come up [to Fort Wayne]. (Tr. p. 111). Holliday admitted that he still continues to use marijuana but has stopped selling it. (Tr. pp. 119-120). It was not developed how

Holliday and Spillers came to work together nor how Lacey became the target of the investigation.

However, Holliday had been acquainted with Petitioner, Joe Lacey, for several years and although he had never purchased drugs from Lacey, he had purchased cocaine from Lacey's co-defendant Gordon Arnold. (Tr. p. 103).

Between July 11, 1980 and July 24, 1980 informant Holliday made two phone calls from Mississippi to Lacey's house in Fort Wayne, Indiana. (Tr. pp. 116-118). One call was made from a pay telephone and was monitored and recorded on tape by the Mississippi police. (Tr. pp. 116-117.) Information that the telephone conversation had been tape-recorded was never disclosed to the defense attorney and apparently Lt. Spillers and Holliday did not disclose the existence of the tape recording to the government attorney or other government agents either.

Between the 11th to the 24th of July, 1980,

Lt. Spillers also made contact with the Allen County Police Department and the Federal Drug Administration. Those three agencies coordinated efforts and planned to have Holliday come to Fort Wayne, Indiana for the purpose of introducing a government undercover agent to Petitioner Lacey. (Tr. pp. 68-69).

On the 24th of July, 1980, Holliday and Lt. Spillers arrived in Fort Wayne, Indiana and took a room at a hotel. From the hotel room, at about 4:00 PM, Holliday called Lacey and had a conversation, which was recorded and admitted at trial (Exhibit 1, first conversation). Again at about 4:40 PM, Holliday called Lacey and a second recorded conversation occurred with Holliday. Then Lt. Charles Peasant, a federal undercover officer, talked to Lacey (Exhibit 1, second conversation), and arranged to go to Lacey's house at 2727 Reed Street.

After the second phone conversation, Holliday and Lt. Peasant made arrangements for back-up surveillance and took a cab to

the Lacey house, at about 5:30 PM. (TR. p. 146). Upon arriving at the Lacey house, Holliday and Peasant were shown in by co-defendant Turner, who indicated they should go to the basement area, where they met Lacey and Gordon Arnold. When Holliday and Peasant entered the basement, Lacey and Arnold were smoking coke and Peasant indicated that he wanted to purchase an ounce of cocaine and an ounce of heroin. Although not sure which defendant he was dealing with, Peasant stated that he agreed to pay $1900.00 for one ounce of cocaine and Peasant and Holliday were instructed to go back upstairs. After about ten (10) minutes they went back downstairs and Gordon Arnold gave Peasant a bag containing one (1) ounce of cocaine. (Tr. p. 152). After the four returned to the first floor, Lacey told Arnold, Holliday and Peasant to take the stuff and get out of his house. (Tr. p. 132; pp. 191-192).

The actual sale did not take place until Arnold and Peasant walked off down the street

a distance and Arnold sold the ounce of cocaine to Peasant and Peasant paid him $1900.00. (Tr. pp. 190-191).

Peasant called Lacey two (2) times during the evening of the 24th of July, one (1) of which was successfully recorded, (Exhibit 1, 3rd conversation) indicating he was interested in buying more cocaine.

On July 25th, Peasant again called Lacey at 11:10 AM and told Lacey that he had an okay to make additional purchases, to which Lacey replied that Arnold was not there but he would be in a short while. (Tr. p. 163). Peasant made two (2) further calls, talking only to Gordon Arnold, both recorded (Exhibit 2, two conversations), during which Arnold and Peasant arranged a meeting the same day at a restaurant and at that time Arnold attempted to sell a quantity of cocaine to Peasant. Arnold and Turner were arrested at that time.

Lacey testified that Gordon Arnold stayed at his house off and on and that he knew Arnold dealt in cocaine, but he had told Arnold

not to do it in his house. (Tr. pp. 295-297). Lacey testified the cocaine received from Arnold was not his and that he did not receive any of the money or share in the deal. Lacey said he let Arnold meet Holliday and Peasant at his house because three (3) days earlier Arnold threatened to stab or cut up Lacey's girlfriend if he messed up his deal with Holliday. (Tr. pp. 298-299). At that time, Lacey had overheard Arnold talking a deal to Holliday on the phone and had told him to take his stuff and get out which precipitated an argument and the threat with a straight razor.

Lacey testified that when Holliday called him from Mississippi, both conversations were about Holliday's wanting to come to Fort Wayne to gamble. Defense counsel did not realize one of those conversations had been taped by the Mississippi police until informant Holliday testified at trial. (Tr. pp. 116-117).

WHEN THE SECOND FEDERAL QUESTION WAS RAISED

On two occasions during the testimony of a Special Agent of Drug Enforcement Administration, Walter Peasant, the presiding judge undertook, upon his own volition, to interrogate the witness. (Tr. p. 197 L. 8-18 and Tr. p. 200 L. 16-24).

The first occasion came at the completion of cross examination by both defense counsel. The prosecutor began this re-direct; which is directly quoted from the transcript on page 197, lines 1-19:

> By Mr. Miller:
>
> Q. "Agent Peasant, in relationship to the questions put to you regarding the use of a body recorder, will you again tell the Ladies and Gentlemen of the Jury why you chose not to wear a body recorder?"
>
> A. "Yes. On numerous occasions I have been searched and therefore I choose not to wear a body recorder."
>
> THE COURT: "Excuse me, I am not sure that I understand. Searched by who, Special Agent?"
>
> A. "By whoever I may be purchasing narcotics from."

THE COURT: "In other words, if you were going into an area where you thought there was drug dealing?"

A. "Yes, sir."

THE COURT: "Those people might search you?"

A. "Yes."

THE COURT: "Well, what would be the significance if they found a body wire on you?"

A. "Well, it could cost my life."

THE COURT: "You may proceed."

After which the prosecutor completed his re-direct on other subjects. Defendant-Appellant's counsel then, on re-cross, propounded further questions regarding the use of body transmitters to preserve evidence. (TR. p. 199 L. 10; Tr. p. 200 L 10). After all counsel had indicated they were completed in their examination of Special Agent Peasant, the presiding judge further questioned the witness as follows:

THE COURT: "Special Agent Peasant, my curiosity is aroused. How many alleged drug buys would you say you have been involved in as a Special Agent with the DEA?"

A. "I have been with DEA approximately seven years, and probably 75 percent of my time has been doing that."

THE COURT: "What percentage of the cases would you say either you or the purchasing agent used a voice recorder?"

A. "I have not used one over a dozen times."

(Tr. p. 200 L. 16-24).

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the due process principles provided for in the Fifth and Fourteenth Amendments to the Constitution of the United States.

During the testimony of informant, Earnest Holliday, in cross-examination, it was first revealed that at least one telephone call from the witness to Joe Lacey had been recorded by Mississippi police, some time between July 11 and 24th of 1980. (Tr. p. 115 l. 5; Tr. p. 118, L. 12). Despite previous assurances by the government that it would fully cooperate in pretrial discovery, the existence of additional tapes which were not to be presented

to the jury surprised counsel. Counsel repeatedly objected to the admission of the partial taped recordings. The government's attorney apparently had been unaware of the existence of this taped conversation until it came out at trial.

There can be little doubt that pre-trial disclosure of the tape recording would have substantially affected the defense's preparation for trial and pre-trial discovery, by providing an accurate account of at least one of the telephone converssations prior to the evening of July 24, 1980. The topic of these conversations is disputed in the testimony of government witness Holliday and Defendant Lacey; and an accurate recording of one (1) of the telephone calls would be valuable evidence in determining the veracity of the witnesses.

There is no doubt that if the U.S. Attorneys office had knowledge of the existence of the tape recording, it would have been their duty to disclose its existence to defense counsel.

Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194 (1963), Giles

v. Maryland, 386 U.S. 66, 17 L.Ed, 737, 87 S.Ct. 793, (1967), U.S. v. Butler, 567 F2d 885 (9th Cir. 1978). Additionally, the defense counsel is entitled to rely upon the open file discovery and other discovery pursuant to the Court's discovery order entered August 11, 1980, directed to the government. (App. 7).

The belated discovery of the existence of the recording rendered a fair and impartial trial on the merits impossible by denying the defense access to, and effective use of, the recorded conversation; and thus constituted a denial of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States. As in Giles, supra, "[t]here can be little doubt that the defense might have made effective use of the report [recording herein] at the trial or in obtaining further evidence."

In its Order of October 29, 1980, denying defendant a new trial the court entered its findings in the following words:

> In the first numbered paragraph of the motion, the defendant charges that the Government failed to disclose exculpatory evidence. During the Testimony at trial, it developed that some days in advance of the days on which the defendant allegedly committed the crimes charged, a Lieutenant Spillers of the Mississippi State Police may have taped one or two conversations between the government informant Holliday and the coconspirators between Mississippi and Fort Wayne, Indiana.
>
> Neither the Government nor the government agents had any information which would have indicated that such conversations were in fact taped. It developed only during the testimony of the informant Holliday and was in no other way corroborated. There was no showing that any representative of the Government ever knew of or had access to any such tapes, nor was there any showing that if such tapes had in fact been made by the Mississippi State Police that they were in any way exculpatory to the defendant Lacey. From the testimony of the government informant Holliday, it could be assumed that the conversations were not in fact exculpatory.
>
> (App. 8,9)

The Court asserts two (2) reasons for denying defendant's motion for a new trial on these grounds: (1) that no government agent had the tapes or information regarding them and (2) the conversation contained on the tape could not be exculpatory.

In the first case, informant, Earnest Holliday, testified in court as to his knowledge of them. Holliday testified that the police in Mississippi taped the telephone conversation. (Tr. p. 115 L. 20-22). At the time, Holliday was working directly with Lt. Charles Spillers, Mississippi State Police. (Tr. p. 92). In that capacity he originated contact with defendant Lacey, an acquaintance of his.

Holliday testified that he received $300.00 from the government for coming to Fort Wayne (Tr. p. 92 L. 4-11) and that on July 24, 1980, he was "working in an undercover capacity for the federal government and the Drug Enforcement Administration." (Tr. p. 91 L. 18-21). He further testified that Lt. Charles Spiller, Mississippi State Police, also was paid to come up to Fort Wayne to work on the investigation. (Tr. p. 92 L. 1-11).

Lt. Ralph West, Allen County Police Department, in coordination with the Mississippi

Bureau of Narcotics was engaged in an investigation which was aimed at introducing an undercover agent to the defendant. (Tr. p. 68 L. 5-18). Lt. West also testified that the Drug Enforcement Administration from Hammond was involved in the investigation. (Tr. p. 69 L. 9-11).

The facts produced at trial clearly show that Holliday and Spillers were agents of the government and were working consistently within that relationship both in Mississippi between July 11th and July 24th of 1980 and in Fort Wayne, Indiana on the 24th and 25th of July, 1980. The government's attorney, for its own purpose, solicited precisely that information before the jury by leading Holliday's testimony to that effect. (Tr. p. 91 L. 18-21).

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, L.Ed. 2d 104 (1972), illustrated that the government is viewed as one entity for Brady purposes. In veracity cases, the failure of government agents to apprise

the United States Attorney of matters affecting exculpation before trial does not diminish the scope of the government's obligation. "Deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief." Levin v. Katazenbach, 363 F2d 287 (USCA D.C. Cir., 1965).

The record indicates that the government case was built around tape recorded telephone calls. (States Exhibit 1 and 2) Five (5) of seven (7) phone calls on July 24th and 25th were successfully recorded and admitted at trial. The government agents and government attorney were aware that other telephone conversations had taken place between government witness Earnest Holliday and defendant Joe Lacey and Arnold Gordon, co-defendant, in the two (2) week period prior to Holliday and Spillers coming to Fort Wayne to execute the introduction of the government agent. A tape recording of these telephone conversations

is an evident and logical possibility and defense counsel is reasonable in relying on any such evidence that is within the knowledge or control of the government attorney. If a proper diligence had been exercised, the existence of these tape recorded conversations would have been properly disclosed prior to trial pursuant to the court order and open file discovery. "It is clear that non-disclosure is not neutralized when the deception is practiced on the prosecuting attorney as well as the defendant." Nash v. Purdy, 283 F.Supp. 837 (USDC S.D. Fla., 1968); Imbler v. Craven, 298 F.Supp. 795, affd. (CA9 Cal.) 424 F2d 631, Cert. denied 400 U.S. 865, 27 L.Ed. 2d 104, 91 S.Ct. 100; Barbee v. Warden, Maryland Penitentiary, 331 F2d 842 (CA4Md, 1964).

The trial court's second reason for denying defendant's motion for a new trial on this basis was that there was no showing that they were exculpatory. Two (2) witnesses testified regarding the recollection of the conversations in question; Earnest Holliday, the

government witness who placed the call, (TR. p. 91 L. 20; Tr. p. 92), and defendant Lacey who received the call and participated, at least for a time, in the conversation. (Tr. p. 291 L. 8; Tr. p. 295 L. 24).

Earnest Holliday, the government's paid informant (Tr. p. 92), who had one (1) conviction in Mississippi (Tr. p. 90) and another marijuana sale charge pending (Tr. p. 90) and who admitted to continuing drug use (Tr. p. 119) and who Lt. Charles Spillers told "it would be a whole lot better on me, he said to me, if I did, you know, come up," (Tr. p. 111). Both witnesses would appear to have an interest in the outcome of the trial. The credibility of each would be subject to scepticism. And, the entire time, a tape recording of at least one (1) of the conversations existed. The most reliable evidence as to the conversation was not available because its existence had not been disclosed. Additionally, Lt. Spillers of the Mississippi State Police Drug Enforcement Bureau was not

called to testify by the government, although he had been a part of and instigator of the investigation. The government did fly Holliday from Mississippi for trial, but not Spillers.

The best evidence of the accurate conversation that took place between Holliday and Lacey is obviously the tape recording of it.

The Court of Appeals and the trial court are not justified in assuming that the conversations were not in fact exculpatory. In fact, failure to call government agent Lt. Spiller (who, prior to the first disclosure of the tape, the defense had no need of but could reasonably assume he would be hostile) could well give rise to a presumption against the government. Lt. Spillers' importance was in effect hidden from defense counsel as counsel relied upon government disclosure to

the effect that no additional tape recordings had been made other than those presented in court. Since it was Lt. Spillers who was Hilliday's supervisor in Mississippi and he was present through the entire course of the investigation from Mississippi to Fort Wayne, Indiana and the arrest; he would be the government agent most familiar with the investigation as it began in Mississippi. "When there is substantial room for doubt as to prosecution's duty to disclose evidence that may reasonably be considered admissable and useful to defense, the prosecution is not to decide for the court what is admissable or for the defense what is useful." Barbee, supra. "Defendant was clothed with the presumption of innocence and it was incumbent upon the government to prove his guilt beyond a reasonable doubt. The failure of the government, under the circumstances disclosed, to call these witnesses justifies, if it does not compel, the inference that their testimony would have been against the government." Wesson v. United

States, 172 F2d 931 (USCA 8th Cir, 1949). It may be presumed that the production of the tape recordings of the conversation between Holliday and Lacey would have been exculpatory and useful to the defense both in preparation for trial and as evidence of entrapment and for impeachment of government witness Earnest Holliday.

Contrary to the opinion of the Court of Appeals, the undisclosed tape could have been very useful and the government's negligent non-disclosure violated Petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. The decision below directly conflicts with this court's ruling in Quercia v. United States.

On two (2) occasions during the testimony of Walter Peasant, Special Agent of Drug Enforcement Administration, the presiding judge undertook, upon his own volition, to interrogate the witness. (Tr. p. 197 L. 8-18

and Tr. p. 200 L. 16-24).

Recognizing that a presiding judge is not a mere moderator of the proceeding but also is charged with the duty to see that the law is properly administered. United States v. Marzano, 149 F2d 923 (2nd Cir. 1945); Quercia v. United States, 289 U.S. 466, 77 L. Ed. 1321, 53 SCt. 698 (1932); Adler v. United States, 182 F2d 464 (5th Cir. 1911). However, the authority is not one of unlimited discretion with the trial court judge. Quercia (supra); United States v. Lomas, 440 F2d 335 (7th Cir. 1971); United States v. Carmel, 267 F2d 345 (7th Cir. 1959). The presiding judge must maintain a proper appearance of detachment and neutrality and the more so when presiding over criminal cases where the accused is presumed innocent until such time as the jury determines otherwise. Carmel, (supra); United States v. DeSisto, 289 F2d 833 (2nd Cir. (1961); Adler, (supra).

The harm that is to be avoided is that the jury may rely upon preceptions of the judge's beliefs as to ultimate facts rather

than make their own independent determinations of such facts; and thusly deny the accused a fair and impartial trial by jury. Marzano, (supra); Adler, (supra). The jury understands the counsel of the parties to be partial and may, by sceptical attention, properly evaluate their comments and interrogation of witnesses. The influence of the presiding judge is quite different as recognized in Quercia, supra, [t]he influence of the trial judges on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference and may prove controlling (referring to judicial comment). The above statement is equally applicable to judicial interrogation of witnesses. "Despite every allowance he [trial judge] must not take on the role of a partisan ... prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." Marzano, supra, also Adler, supra, Carmel "[I]n propounding questions to a witness the Judge must avoid

the appearance of becoming an advocate for one side and must refrain from indicating his opinion of the guilt or innocence of the defendant." Lomas, supra.

In the present case, the government ruled heavily on recorded conversations. Yet, no effort was made to record the conversation between Special Agent Peasant, informant Earnest Holliday, Arnold Gordon, and Petitioner Joe Lacey on the evening of the 24th at Laceys house. Testimony did indicate that it could have been recorded via a "body transmitter." (Tr. p. 187 L. 5; Tr. p. 188 L. 3)

The content of this conversation was the source of contradictory and conflicting testimony between the defendant and prosecution witnesses and among the prosecution's witnesses. During cross-examination, defense counsel appropriately questioned Special Agent Peasant regarding his failure to wear a transmitter and thus preserve an accurate record of the very critical conversation for the jury. (Tr. p. 187 L. 17-22).

Upon completion of cross-examination by both defense counsel, the prosecutor began this re-direct; which is directly quoted from the transcript on page 197, lines 1-19:

By Mr. Miller:

Q. "Agent Peasant, in relationship to the questions put to you regarding the use of a body recorder, will you again tell the Ladies and Gentlemen of the Jury why you chose not to wear a body recorder?"

A. "Yes. On numerous occasions I have been searched and therefore I choose not to wear a body recorder."

THE COURT: "Excuse me, I am not sure I understand. Searched by who, Special Agent:"

A. By whoever I may be purchasing narcotics from."

THE COURT: "In other words, if you were going into an area where you thought there was drug dealing?"

A. "Yes, sir."

THE COURT: "Those people might search you?"

A. "Yes."

THE COURT: "Well, what would be the significance if they found a body wire on you?"

A: "Well, it could cost my life."

THE COURT: "You may proceed."

After which the prosecutor completed his re-direct on other subjects. Defendant-Appellant's counsel then, on re-cross, propounded further questions regarding the use of body transmitters to preserve evidence. (Tr. p. 199 L. 10; Tr. p. 200 L. 10). After all counsel had indicated they were completed in their examination of Special Agent Peasant, the presiding judge further questioned the witness as follows:

> THE COURT: "Special Agent Peasant, my curiosity is aroused. How many alleged drug buys would you say you have been involved in as a Special Agent with the DEA?"
>
> A. "I have been with DEA approximately seven years, and probably 75 percent of my time has been doing that."
>
> THE COURT: "What percentage of the cases would you say either you or the purchasing agent used a voice recorder?"
>
> A. "I have not used one over a dozen times."
>
> (Tr. p. 200 L. 16-24)

While the extent of the interrogation by the presiding judge was not lengthy in

comparison to some cited cases, Adler, supra, the questioning was of such a nature as to align the presiding judge with the prosecution in the eyes of the jury. In the first instance the presiding judge simply interjected himself into the only just started redirect of the prosecutor and took over the follow-up questioning. In the second instance, the question of the presiding judge was not answered; rather by comparing percentages and absolute numbers an impression certainly was created but the question went unclarified.

"...[A]n alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses. However, he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever observant jurors." Carmel supra, also United States v. Hill, (7th Cir. 1964), 332 F2s 105.

The Federal Rules of Evidence - Rule 614 (b), provides the presiding judge with the power to interrogate witnesses. This power is a necessary tool of a presiding judge for the proper administration of the law. This power is properly exercised to prevent the jury from being mislead by improper tactics or misuse of evidence or to avoid harm or forfeiture due to negligent counsel. However, no such claim of justification exists in the present case. In the first instance the presiding judge simply took over the line of questioning which the prosecutor had already begun and certainly at the conclusion of the presiding judge's interrogation further redirect would have been anti-climactic. And, in the second instance the interrogation simply presented further confusion by disjointed statistics; and created an impression prejudicial to defendant.

In summary, the Petitioner complains of the interrogation by the presiding judge of witness Walter Peasant in that it was pro-

secutorial in nature and prejudicial to the defendant's right to a fair and impartial jury trial. That the interrogation aligned the presiding judge with the prosecution in attempting to dismiss or minimize the defendant's concern regarding the government agent's conscious decision not to record a critical conversation; and that the interrogation destroyed the judge's impartiality in the eyes of the jury.

Petitioner relies upon the law as set forth in Adler, supra, as an accurate and concise statement of the prevailing law and reason;

> "The trial judge, under the federal system, is not only permitted, but it is his duty, to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilitory tactics of counsel. The purpose of the trial is to arrive at the truth, and without unnecessary waste of time. In performing his duties, it may become necessary to shorten the examination of witnesses when it becomes essential to the development of the facts of the case. This is a matter within the discretion of the court, with which we would be reluctant to interfere. But the conduct of the judge, in the performance of all his duties, should appear

to be impartial. The impartiality of the judge--his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally sumbitted to the jury--is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of opinion that the judge is permitted to take part impartially in the examination of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocense by both judge and jury till his guilt is proved . If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.

A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as theymight hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of

> their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable. Counsel are expected to maintain an attitude of respect and deference toward the judge, and this attitude is maintained without difficulty when the judge confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties incumbent properly upon an attorney representing one side of the case. The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appelate court would not be justified in interfering with the judgment on this account alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge is unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial.

Contrary to the opinion of the Court of Appeals, the district court judge engaged in prosecutorial interrogation and was not simply asking questions of clarification.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

APPENDIX

TABLE OF CONTENTS OF THE APPENDIX

	Page
Order Below	App. 1, 2, 3
Motion to Reconsider Denial of Defendant's Verified Motion for New Trial	App. 4,5,6,7, 8,9,10,11,12
Order (Denying Motion for New Trial)	App. 14,15, 16,17,18,19
Verified Motion for New Trial	App. 20,21,22,23, 24,25
Order (Discovery)	App. 26, 27
Motion for Discovery (Defendant)	App 28,29,30
Docket Entries	App. 32,33,34,35
Grand Jury Charges	App. 36,37

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOE LACEY

VS.

UNITED STATES OF AMERICA

No. 80 - 2761

June 22, 1981

ORDER

This matter comes before this Court on the appeal of Defendant-Appellant Joe Lacey from a conviction for distribution and conspiracy to distribute cocaine. Lacey argues that the district court erred by engaging in alleged prosecutorial interrogation of a witness and contends that the government's failure to disclose a tape recording of a telephone conversation between him and a government witness resulted in a denial of due process of the law.

At oral argument, counsel for Lacey did not pursue the first contention but did argue that the failure of the governement to disclose the tape recording prior to or at trial was negligent non-disclosure. Lacey's counsel further argued that had the taped conversation been produced at trial, the jury might have reached a different conclusion regarding Lacey's involvement in the cirminal activity. The government's counsel argued that it was unaware of the existence of the taped conversation until its informant took the stand at trial in that this conversation was not taped by its officers but rather was taped by law enforcement personnel from the State of Mississippi in its initial investigation.

Having read the briefs and addressed itself to the record, this Court is not persuaded that the district court judge engaged in prosecutorial interrogation of the witness; rather the judge asked questions of

clarification which did not go to the guilt or innocence of Lacey. As to the claim of denial of due process, there is no evidence to support a finding of negligent non-disclosure in that the government was unaware until the trial of any prior taped conversations. The tapes made by the government were introduced into evidence and were sufficient to support a jury determination of the Defendant's involvement. The Court is convinced that the undisclosed tape of any prior conversation would be of no value. The Defendant himself testified to the contents of the conversation. The jury considered all the evidence and found the Defendant guilty as charged. There is no evidence to support a finding of denial of due process in this case.

For these reasons, we AFFIRM the judgement of the district court.

APPENDIX B

U. S. DISTRICT COURT FOR NORTHERN INDIANA

JOE LACEY

VS.

UNITED STATES OF AMERICA

No. 80-2761

November 19, 1980

MOTION TO RECONSIDER DENIAL
OF DEFENDANT'S VERIFIED MOTION
FOR NEW TRIAL

Comes now Defendant, by counsel, and moves the Court to reconsider its Order dated October 29, 1980. In support of said Motion, Defendant would show the Court that:

1. Defendant's right to a fair and impartial trial were violated by the failure of the government through it's agents as alleged in paragraphs 1, 2, 3, 4 of the Verified Motion for New Trial.

2. That Defendant's rights to a fair

trial was violated by the presiding judge when the Honorable Judge attempted to rehabilitate government witness Walter Peasant concerning said witness' failure to use a body recording device to monitor conversations between Peasant, Lacey, Holliday and Arnold.

3. That Defendant's right to a fair trial were violated in that the convictions upon Count I and III were not established by sufficient admissable evidence as specified in paragraphs 6 and 8 of Defendant's Verified Motion for New Trial.

MEMORANDUM IN SUPPORT

A basic tenet of federal trial law and procedure is that a trial court should always be cognizant of any potential corruption of the truth seeking functions of the trial process. U. S. v. Agurs 427 US at 103-04, 96 S. Ct. at 2397. In this duty, the presiding judge stands as the ultimate protector of a Defendant against excess or abusive tactics

by government agents.

Brady v. Maryland 373 U.S. 83 (1963) established the broad proposition that a prosecutor has a continuing duty to disclose exculpatory evidence in response to a request by defense counsel. Giles v. Maryland 386 U.S. 66 (1967) broadened the Brady proposition in that the case held that the "duty" is not based upon a deliberate withholding of knowledge by the prosecutor. The Court was there concerned with "broad questions of whether the prosecutor's constitutional duty to disclose extends to all evidence admissable and useful to the defense." 386 U.S. at 73-74. Exculpatory means and includes anything that will show that the government cannot prove by constitutional means beyond a reasonable doubt that the Defendant committed a crime.

Potential exculpatory evidence includes evidence concerning a witness' credibility or reasons for testifying in a certain manner. In Napue v. Illinois 360 U.S. 264 (1959) the

Court held:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. 264 at 266

The proper standard in negligent nondisclosure cases should call for a new trial whenever the nondisclosed evidence might reasonably have affected the jury's judgment on some material points without necessarily requiring a supplementary finding that it also would have changed its verdict. U.S. v. Butler, 567 F2d 885 (9th Cir. 1978). A prosecutor is under a duty to correct not only perjury but also any potentially erroneous impression which could mislead a jury about the scope of the government's dealings with a witness. Blankenship v. Estelle 545 F2d 510 (1977).

Giglio vs. U.S. 405 U.S. 150 (1972) illustrated that the government is viewed as one

entity for Brady purposes. In verocity cases, the failure of government agents to apprise the U.S. Attorney of matters affecting exculpation before trial does not diminish the scope of the government's obligation.

The case at bar is one instance of the pyramiding and cumulative effect of the failure of the government to abide by the Court's "open discovery" and Brady disclosure rules. In the case at bar, the U.S. attorney and defense counsel first learned of the existence of additional taped conversations between Holliday and Lacey (between July 1-July 22, 1980) at trial. Defense counsel maintains that the government's weak and ineffective reason for its failure to produce said tapes prior to trial is incredible and casts doubt upon the conduct of government agents in its dealings with the U.S. attorney. The government maintains that the activities of Mississippi State authorities including Lt. Spillers was not part of the Fort Wayne investigation.

However, even the government's paid criminal witness Holliday admitted that Lt. Spillers of the Mississippi State Police traveled to Fort Wayne and was present when the taping procedure began in early July was continued to its fruition, the retaping and subsequent arrest of Joe Lacey. Defendant would also note the convenient absence from the trial of Lt. Spillers. The defense could not have properly evaluated the potential importance pf Lt. Spillers' testimony and taped communications because it was not aware of the additional taped communications until the middle of the trial!

The Court, in light of the narcotics agent's failure to provide this taped material before trial, should not have baldly adopted informer Holliday's testimony as to the content of the conversations in its October 29, 1980, Order denying a new trial. That the jury may have been affected in its deliberations had it the entire taped records before

it requires a new trial.

The potential importance of the entire content of the communications between government agents and Lacey pyramids with the erroneous admission into evidence of the "produced before trail" tapes. A similar effect would be trying to understand the content of a detailed map without having the entire mpa to look at and study. The admission of these additional tapes is tainted by the "secreting" of the taped details of the first contacts between government agents and Lacey. Defendant objected to the admission of these tapes and the jury was forced to make its deliberations with the spector of a potential corruption of the truth seeking process self evident.

These errors are compounded by the court's prosecutorial rehabilitation of government agent Peasant. Having first "neglected" to produce the entire record of contacts between government agents, Lacey and accused co-conspirator Arnold, the agents next consciously

decided not to tape the contents of the fruit of those contacts, the alleged buy. When the Defendant sought to show the jury the importance of this conscious decision by the agents, the Court stepped in on its own not for the purpose of witness clarification, but to rehabilitate the witness and aid the government position.

Given the above errors, the government could not, as a matter of law, have established beyond a reasonable doubt and by sufficient evidence the following essential elements: a) no actual or constructive possession of the drug cocaine by Defendant Lacey; b) no admissable evidence of agreement of conspiracy between Lacey and Arnold; c) failure to establish that Defendant was not entrapped or coerced.

WHEREFORE, Defendant, by counsel, respectully moves the Court to reconsider its Order of October 29, 1980, denying Defendant a new trial, reverse same, and for all other

just and proper relief.

Respectfully submitted,

By: _____

K. Richard Payne
GRIMM & PAYNE
6157 Stoney Creek Drive
Fort Wayne, Indiana 46825

CERTIFICATION OF SERVICE

This is to certify that I, the undersigned, did on this 9th day of March, 1981, mail a copy of this Defendant-Appellant's Brief to David Miller, United States Attorney for the Northern District of Indiana, Federal Building, Harrison Street, Fort Wayne, Indiana 46802.

K. Richard Payne
Counsel for Defendant-Appellant

Order denying Motion for New Trial filed October 29, 1980:

ORDER

On October 28, 1980, the defendant herein, Joe Lacey, filed a motion for a new trial. At the conclusion of a jury trial on October 21, 1980, the defendant Lacey was found guilty as charged in the indictment on Counts I and III of the indictment. In Count I, the defendant was charged and convicted of knowingly and intentionally distributing or possessing with intent to distribute a quantity of cocaine. In Count III, the defendant Lacey was charged and convicted with conspiring with one Gordon Arnold, a/k/a Arnold Gordon, to distribute cocaine. At the time of trial, the defendant Gordon was a fugitive and had not been apprehended by the Government. He became a fugitive after arraignment and prior to trial.

In the first numbered paragraph of the motion, the defendant charges that the Government failed to disclose exculpatory evidence.

During the testimony at trial, it developed that some days in advance of the days on which the defendant allegedly committed the crimes charged, a Lieutenant Spillers of the Mississippi State Police may have taped one or two conversations between the government informant Holliday and the co-conspirators between Mississippi and Fort Wayne, Indiana. Neither the Government nor the government agents had any information which would have indicated that such conversations were in fact taped. It developed only during the testimony of the informant Holliday and was in no other way corroborated. There was no showing that any representative of the Government ever knew of or had access to any such tapes, nor was there any showing that if such tapes had in fact been made by the Mississippi State Police that they were in any way exculpatory to the defendant Lacey. From the testimony of the government informant Holliday, it could be assumed that the conversations were not in fact exculpatory.

At paragraph numbered 2, the defendant contends that this court should not have admitted five taped conversations between the informant and an undercover DEA agent on one phone and the defendant Lacey and his co-conspirator Gordon on the other phone. Proper basis was established for the admission of the evidence and the voice of the defendant Lacey was properly identified. That the missing co-conspirator Gordon was not present at the trial but participated with the defendant Lacey at his place of residence in one or more of the telephone calls does not make the calls inadmissible by reason of being hearsay. In the first place, the calls were not hearsay under the circumstances of this case, and, although no objection was made by defense counsel, the tapes were admitted only after the preponderance of the evidence established the existence of a conspiracy and the defendant Lacey's participation therein.

The defendant further contends that the

Government failed to disclose the "complete benefits promised" to the informant Holliday. This assertion is patently false, as the record will disclose. Defendant also appears to protest several questions asked of witnesses by the Court. These questions were for the sole purpose of clarifying answers of certain witnesses. The defendant next contends that there was not sufficient evidence to support his conviction. The evidence was more than ample to establish the guilt of the defendant Lacey beyond a reasonable doubt.

The defendant next contends "that the defendant believes that access to the jury room may have been compromised by the U. S. Attorney's office. The defendant bases his belief upon verbal assertions of a spectator; counsel has no personal knowledge of the facts supporting this allegation." This court simply does not understand what compromising the jury room is in the context here used. No specifics are given. The jury room is on the third

floor of the Federal Building in Fort Wayne, Indiana, and there is absolutely no access to the jury room from the third floor of the building. The only access is through a small vestibule and up a stairway from the second floor. The access was guarded by one or more deputy United States marshals at all times during the jury's deliberation. For defense counsel to make such a serious charge against the United States Attorney's Office without one specific fact to corroborate such charge is extremely regrettable. However, by reason of the serious nature of the charge, defendant's counsel shall file with this court, within ten (10) days of the date of this order, a detailed showing specifying the exact nature of such alleged compromise.

Lastly, defendant contends that the Government failed to establish beyond a reasonable doubt that the defendant was not entrapped or coerced. The jury was properly instructed on these defenses even though the evidence

of any entrapment or coercion came solely from the defendant and his girl friend and was of questionable, if any, weight under the circumstances. The jury quite properly found that the defendant was not entrapped or coerced.

Accordingly, the motion for a new trial is now denied; provided, however, that defense counsel shall file the showing hereinbefore required within ten (10) days of the date of this order, and if such showing is sufficient to warrant an evidentiary hearing, then such a hearing will be held.

Entered this 29th day of October, 1980.

United States District Judge

Verified Motion for New Trial filed October 28, 1980:

VERIFIED MOTION FOR NEW TRIAL

Comes now Defendant, Joe Lacey, in person and by counsel and pursuant to FRCP Rule 33, moves the Court to correct pre-judicial errors occuring at trial, reverse his conviction and grant a new trial. In support of said motion Defendant would show the Court the following:

1. That the Government failed to disclose exculpatory evidence concerning one or more taped conversations between Joe Lacey and Ernest Holliday, which conversations would tend to support Defendant's lack of involvement in any drug scheme. Defendant maintains that the Government's explanation for the unavailability of the tape or tapes of conversations between July 1, 1980 through July 22, 1980 (to the effect that the activities of the Mississippi State Authorities were not part of the Fort Wayne investigation) is clearly unacceptable as Government witness Holliday

stated that Lt. Spillers of the Mississippi State Police travelled to Fort Wayne and was present when the taping procedure was continued on July 24 and 25, 1980. Said failure of disclosure violates the Court's "open discovery" order and rendered a fair trial on the merits impossible.

2. That in the absence of the Mississippi tape or tapes, the Court erred in admitting into evidence any of the taped conversations included in government exhibits A and B for the reason that said conversations constituted only a selective, edited and partial record of the Defendant's conversations between July 1, 1980 - July 25, 1980.

3. That the admission of taped statements of Defendant Gordon Arnold were highly prejudicial and violated the Defendant's right to a fair trial as the statements are heresay; further, that the Defendant was thus denied the right to confront and cross-examine the speaker, Gordon Arnold. Defendant

maintains that no evidence of conspiracy was established by a preponderance of the evidence in support of the admission of the Gordon Arnold tapes.

4. That the government failed to disclose the true and complete benefits promised, other potential charges either not filed or threatened to be filed, and other means of duress used to procure the testimony of Ernest Holliday; further, that such failure to disclose denied Defendant a fair trial.

5. That during the questioning by defense counsel of government witness Walter Peasant, counsel established telling points concerning the failure of the witnesses use of a body recording device and the reasons therefore in an attempt to rehabilitate the government witness; that such questions prejudiced the jury in that the nature of the questions appeared to be prosecutorial in nature and not those of a neutral and detached presiding judge. Further, that such questions from the presiding judge denied Defen-

dant a fair and impartial trial.

6. That the convictions upon Count I and III of the indictment were not established by sufficient evidence in that a) No actual or constructive possession of the drug cocaine was proven as to Defendant Lacey; b) That the Defendant's guilt as to Count I was not extablished beyond a reasonable doubt in that he publicly and expressly disclaimed any sales involvement during the taped conversations. c) That no admissable evidence of agreement of conspiracy between Defendants Lacey and Arnold was placed before a jury.

7. That the Defendant believes that access to the jury room may have been compromised by the U. S. Attorney's office. The Defendant bases his belief upon verbal assertions of a spectator; counsel has no personal knowledge of the facts supporting this allegation.

8. That the government failed to establish beyond a reasonable doubt that the Defendant was not entrapped or coerced.

WHEREFORE, the Defendant in person and by counsel moves the Court to correct the above stated errors at trial, reverse his conviction, grant him a new trial and for all other just and proper relief.

I affirm, under the pains and penalties of perjury, that the above is true and correct to the best of my belief and knowledge.

Joe Lacey

STATE OF INDIANA)
) SS:
COUNTY OF ALLEN)

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 24th day of October, 1980.

Monica M. Crandall
Notary Public

My Commission Expires:
4/20/84

Respectfully submitted,

By: _____

K. Richard Payne
GRIMM & PAYNE
6157 Stoney Creek Drive
Fort Wayne, Indiana 46825
Telephone: (219) 482-3543
Counsel for Defendant

Order filed August 11, 1980:

ORDER

On August 7, 1980, counsel for the defendant herein filed a motion for discovery. Normally, it has been the policy of the United States attorney's office to provide defense counsel complete open file discovery. Defense counsel has apparently made no effort to pursue this avenue of discovery, and the court recommends that defense counsel do so. However, based upon the issues presented in the motion for discovery, this court is compelled to rule in accordance with Rule 16 of the Federal Rules of Criminal Procedure. Accordingly, the court rules as follows:

1. The Government need not supply the list of witnesses for trial requested in Paragraph 1 of the motion.

2. The Government shall provide any statement made by the accused or any codefendant, but need not supply the witnesses requested in Paragraph 2 of the motion.

3. The Government shall provide the materials sought in Paragraph 3 of the motion.

4. The Government shall provide the materials sought in Paragraph 4 of the motion.

5. The Government shall provide the materials sought in Paragraph 5 as to the defendant only.

6. The Government shall provide the information sought in Paragraph numbered 6 in the motion.

This material shall be supplied to defense counsel in the office of the United States attorney in the United States Court House in Fort Wayne, Indiana, on Friday, August 15, 1980.

Entered this 11th day of August, 1980.

_____

United States District Judge

Motion for Discovery filed August 7, 1980:

MOTION FOR DISCOVERY

Defendant, by counsel, now moves the Court for an Order granting the following discovery in the above-entitled cause and further moves the Court for an Order directing the United States to provide said discovery within thirty (30) days of the Court's Order and Defendant further moves that the Motion for Discovery as ordered with corrections and/or additions, including, but not limited to the identity and location of additional persons having knowledge of discoverable matters and the identity and location of additional persons expected to be called as witnesses and the subject matter of their anticipated testimony, in this:

1. The names, last known addresses, dates of birth, and social security numbers of persons whom the United States intends to call as witnesses together with their written and/or recorded statements and/or me-

moranda containing their oral statements or summaries thereof.

2. Any and all written, recorded, videotaped and/or oral statements made by accused or by co-defendant, and a list of witnesses to the making and/or acknowledgment of such statements.

3. Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and/or scientific tests, experiments or comparisons.

4. Any books, records, papers, documents, photographs or tangible objects which the District Attorney intends to use for any purpose at the hearing or trial, or which were obtained from or belonging to the accused.

5. Any records of prior criminal convictions of witnesses whom the United States intends to call at the hearing or trial and any record of any prior criminal convictions of the Defendant which the District Attorney

might anticipate using at the hearing or the trial.

6. To your knowledge, at the present time, does any law enforcement agency monitor or intercept any attorney-client conversations on the phone #(219) 482-3543 or 743-8067?

WHEREFORE, Defendant requests that the Court grant this motion herein and order the United States to produce those matters aforementioned and that the United States do so within thirty (30) days and that the United States be ordered to supplement the responses and for all other just and proper relief in the premises.

Respectfully submitted,

By: _____

K. Richard Payne
GRIMM, PAYNE & SURBECK
6157 Stoney Creek Drive
Fort Wayne, Indiana 46825
Telephone: (219) 482-3543
Counsel for Dendendant

MEMORANDUM

The Defendant cites as authority for the scope of this Motion for Discovery the Federal Rules of Criminal Procedure.

Docket entries:

Entry of August 15, 1980:

ARRAIGNMENT: Govt. by D. Miller. Deft. in person w/K. R. Payne Deft. arraigned on indictment and pleads not guilty. Jury trial set for Wed. October 8, 1980, 9:30 a.m. Eschbach, Judge. mkh

Entry of September 10, 1980:

ORDER Entered. (SE)Eschbach, Judge. Jury trial setting in this case is now moved from Wed., 10/8/80 to Mon., 10/20/80 at 9:30 a.m. Cp to: T. Felts, K. Payne, AUSA. mkh/car

Entry of October 20, 1980:

TRIAL TO A JURY: Govt. by D. Miller, Deft. Turner by T. Felts, deft. Lacey by R. Payne. Jurors selected, examined and sworn to try cause. Each side presents opening stmts. Plft. presents evidence, concludes and rests. Eschbach, Judge. mkh

Entry of October 21, 1980:

TRIAL TO A JURY CONTINUES: All parties pre-

sent, jurors brought in attendance. Defense presents evidence, concludes and rests. All sides rest, no rebuttal. Jurors excused. Out of hrg and presence of jury, court rules on tendered instructions. Govt. tenders no inst. Deft. Turner 3 inst. Deft. Lacey tenders 8 inst. Court rejects and refuses to give each deft. inst. No obj. by either side to court's instruction. Motion at concl. of evidence for acquittal for Deft. Turner. Denied. Jurors brought in attendance. Govt. presents closing argument. Deft. Lacey and Deft. Turner present closing argument. Govt. presents rebuttal. Court instructs jury. Bailiff sworn. Jurors excused. Out of hrg and presence of jury court rules on inst. Govt. has no obj, Defts. have no obj. to court's inst. as read. Jury commences deliberation at 2:56 p.m. Question by jury at 3:18 p.m. Answer as proposed by court not objected to by any Deft. Govt. objects to court answer. Overruled. Verdict at 6:12 p.m.

Deft. Turner found not guilty. Deft. Lacey found guilty on all counts as charged. Jurors polled at request of court. Jurors discharged. Court adjourned. Eschbach, Judge mkh

Entry of October 28, 1980:

VERIFIED MOTION for New Trial by Deft. Lacy w no p/s. car

Entry of October 29, 1980:

ORDER Entered. (SE)Eschbach, Judge. Deft. Lacey's 10/28/80 motion for new trial denied; provided, however, that defense counsel shall file the showing hereinbefore required within 10 days of the date of this order, and if such showing is sufficient to warrant an evidentiary hrg, then such hrg will be held. Cp to; K. Payne, T. Felts, AUSA. car

Entry of November 19, 1980:

MOTION to reconsider denial of Deft. Lacey's verified motion for new trial w/memo in sppt. of, by Deft. Lacey w/o ps. mas

Entry of November 21, 1980:

ORDER (SE) Eschbach, Judge. Mot. to reconsider new trial denied. Copy to: AUSA, K. Payne. car/mkh

Entry of November 28, 1980:

DISPOSITION: Deft. in person and w/K. Payne. Govt. by D. Miller. Deft. remanded to custody of atty. gen. on Count 1 for a period of 6 yrs. plus a 3 yr. special parole term, fine of $5,000. plus court costs. Deft. remanded on Count 3 for a period of 6 yrs. Sentences to run concurrently. Govt. moves to increase appeal bond to $25,000. w/10% deposit. Granted. Eschbach, Judge.

The Grand Jury charges filed August 1, 1980, in the following words:

COUNT I

On or about July 24, 1980, in the Northern District of Indiana, JOE LACEY, a/k/a JOE B. LACEY, and GORDON ARNOLD, a/k/a ARNOLD GORDON, knowingly and intentionally did distribute or possess with intent to distribute a quantity of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Section 841 (a)(1), Title 21 of the United States Code, and Section 2, Title 18 of the United States Code.

COUNT II

On or about July 25, 1980, in the Northern District of Indiana, RAYMOND TURNER and GORDON ARNOLD, a/k/a ARNOLD GORDON, knowingly and intentionally did distribute or possess with intent to distribute a quantity of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Section 841 (a)(1), Title 21 of the United States Code,

and Section 2, Title 18 of the United States Code.

COUNT III

On or about July 24, 1980, up to and including July 25, 1980, in the Northern District of Indiana, JOE LACEY, a/k/a JOE B. LACEY, and GORDON ARNOLD, a/k/a ARNOLD GORDON, the defendants herein, willfully and knowingly did conspire, combine, confederate and agree together, with each other and with diverse other persons whose names to the Grand Jury are unknown, to violate Title 21 of the United States Code, Section 841 (a)(1), to wit: to distribute cocaine, a Schedule II Controlled Substance, in violation of Section 846, Title 21 of the United States Code.

A TRUE BILL

_____
Foreman

_____
David T. Ready
United States Attorney